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May 30, 2014

Ms. Ann Wessel
Department of Ecology
Bellingham Field Office
1440 10th Street, Suite 102
Bellingham, WA 98225-7028

Regarding: Comments to Spokane River In-stream Flow Preliminary Draft Rule

Dear Ms. Wessel:

The following comments are submitted on behalf of Inland Empire Paper Company (IEP) in regards to the Department of Ecology's (Ecology) Spokane River In-stream Flow Preliminary Draft Rule (ISFR). We appreciate your consideration of these comments as you further develop this rule.

IEP and other NPDES Permitted facilities in the Spokane River watershed have committed to improving water quality under the Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load (DO TMDL). To date IEP has invested well over $10 million in infrastructure improvements and the development of new technologies in an effort to meet the most stringent effluent limitations in the country. It is estimated that costs to the Spokane River watershed region, including both Washington and Idaho, could ultimately approach $1 billion in and attempt to achieve the State's water quality standards. The challenge to IEP and the Spokane region is extreme and may be unattainable with technological improvements alone. These challenges were clearly understood by Ecology and all stakeholders, so the DO TMDL was designed to include innovative actions and management plans, including water conservation, reclamation, reduction and reuse (https://fortress.wa.gov/ecy/publications/publications/0710073.pdf):

- **Abstract (page vii)** – "In addition to installing advanced wastewater treatment technologies, some wastewater treatment plants may need to reduce nutrients through actions such as obtaining offsets from nonpoint source reductions, *water conservation, and wastewater reuse*."

- **Allocations Summary (page vi)** – "Wasteload allocations will be achieved by the installation of the most effective feasible nutrient removal treatment technologies and implementation actions (target pursuit actions) such as nonpoint source reductions, *water conservation and wastewater reuse*."

- **Reasonable Assurance (Page 53)** – "As agreed to in the Foundational Concepts Washington point source dischargers will develop a Delta Elimination Plan detailing the process by which the updated effluent limitations will be met. The plan may include treatment technology selection, engineering reports, construction timetables, a list of actions to reduce influent phosphorus levels, and a list of off-site phosphorus reduction practices (*including water conservation reuse projects*) which may be used as a water quality offset pending Ecology approval."

- **Target pursuit actions – Delta management (Page 62) –"**As described earlier, the term "delta" refers to the difference between what technology improvements can currently achieve and the remaining phosphorus that needs to be reduced *through conservation*, reduction of nonpoint pollution, and other target pursuit actions to meet the final wasteload allocation."

- **Delta elimination plan: (Page 62) - "**In addition to the technology selection protocol, Dischargers will also prepare and submit for Ecology's approval a Delta Elimination Plan and schedule for *other phosphorus removal actions such as conservation, effluent re-use*, source control through support of regional phosphorus reduction efforts (such as limiting use of fertilizers and dishwasher detergents), and supporting regional nonpoint source control efforts to be established."

- **Reclaimed water (Page 64)** - *Publicly-owned dischargers may seek to re-use the Class A (highly treated) reclaimed water they produce as a result of technology improvements. All reasonable efforts to re-use and/or recharge the aquifer, rather than directly discharging it to the river, particularly in the April-October timeframe, are strongly encouraged consistent with circumstances and opportunities.*

- **Regional phosphorus reduction programs (Page 64) -** Privately-owned treatment plants may participate with other publicly-owned NPDES permit holders in regional phosphorus reduction programs, such as *conservation* and nonpoint source control.

There are numerous other references in the DO TMDL that specify effluent conservation, reduction and reuse as a delta elimination opportunity or target pursuit action to meet the final wasteload allocations. Additionally, IEP's NPDES permit specifically identifies delta elimination opportunities to provide reasonable assurance of meeting the final water quality based effluent limits (WQBELs):

- **S5. SCHEDULE OF COMPLIANCE FOR TOTAL PHOSPHORUS, CBOD, AND AMMONIA, Footnote b (Page 15):** Delta elimination plan will include a schedule for other phosphorus, CBOD and ammonia removal actions such as *conservation, effluent re-use*, and supporting regional non-point source control efforts to be established.

Water reduction efforts are essential to IEP's delta elimination plan for both economic and regulatory compliance reasons. IEP has demonstrated through the testing of over 10 advanced treatment technologies that the WQBELs cannot be achieved with the installation of technology alone. Effluent flow reductions will be necessary to meet the mass load WQBELs allocations at the higher performance concentrations of these technologies. Additionally, the capital and operating and maintenance costs of these advanced technologies are significant. The lower the effluent flow to treat results in a direct cost reduction to the amount of technology needed along with the associated operating costs.

IEP's primary concern with the Spokane River In-stream Flow Preliminary Draft Rule is to assure that the water quantity requirements of this rule comport with the water quality requirements under the DO TMDL and to assure that existing water rights are protected. The adoption of minimum flows for the Spokane River by rule constitutes the grant of water right under RCW 90.03.345. The Supreme Court in *Swinomish Indian Tribal Community v. Ecology,* 311 P.3d 6 (2013), made it clear that an in-stream flow rule is a water right. As such, Ecology must make findings under RCW90.03.290(3) that water is available for the proposed in-stream flows, that the establishment of the flows will not impair existing water rights, that the in-stream flows will not be detrimental to the public interest, and limited to the amount necessary to support a beneficial use. This means that the in-stream flows must actually be available in the river and not just within the normal range of variation in stream flows. It also means that the flows should not consist of any flows that are subject to existing water rights.

Ecology would not grant a right in water that is already appropriated to another user and cannot do so with in-stream flows under the *Swinomish* decision. Finally, it also critical that no portion of the in-stream flows for the Spokane River include any flows that result from discharges authorized under the NPDES permits issued by Ecology. Ecology has established nutrient wasteload allocations for dischargers that are among the most stringent of any authority in the country. Meeting the wasteload allocations may depend on removing the discharges from the river and it would be highly detrimental to the public welfare if the in-stream flow rule could be used to claim impairment if and when dischargers remove all or a portion of their effluent from the river.

In order to provide clear and concise resolution between the water quality requirements of the DO TMDL and the water quantity requirements of the Spokane River In-stream Flow Rule, IEP suggests the following language be included in the final rule:

- Nothing in this chapter shall be construed to lessen, enlarge, or modify existing rights, including the right to conserve, reclaim or re-use water, acquired by appropriation or by other means, including federal reserved rights, to constitute a right in the continuation of any existing wastewater or storm water discharge, or to establish a claim of impairment in favor of in-stream flows based on the quantity and quality of wastewater discharges.

We appreciate the opportunity to comment on this preliminary draft rule and trust that you will consider the above in finalizing any in-stream flow rule for the Spokane River. Please contact me should you have any questions regarding this submittal.

Sincerely,

Douglas P. Krapas
Environmental Manager

Cc: K. Rasler